

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

BENJAMIN WAYNE MCCOIN
TDCJ #923939

v.

RICK THALER

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C.A. NO. C-10-389

OPINION DENYING MOTIONS FOR EVIDENTIARY HEARINGS

Petitioner is an inmate in the Texas Department of Criminal Justice, Correctional Institutions Division, and is currently incarcerated at the McConnell Unit in Beeville, Texas. Proceeding pro se, he filed a habeas petition pursuant to 28 U.S.C. § 2254 challenging a state conviction. (D.E. 1). Pending are petitioner's motion for hearing, (D.E. 7); his motion for due process hearing, (D.E. 9); his motion for due process hearing regarding his Fourteenth Amendment right, (D.E. 10); and his motion for due process hearing, (D.E. 12).


Rule 8(a) of the Rules Governing Section 2254 Cases states that "[i]f the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted." Rule 8(c) further requires that "[t]he judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare." The Fifth Circuit has explained that "[a] hearing in a habeas proceeding is required only when, *inter alia*, the record reveals a genuine factual dispute." Tague v. Puckett, 874 F.2d 1013, 1015 (5th Cir. 1989) (emphasis added); see also Murphy v. Johnson, 205 F.3d 809, 815-16 (5th Cir. 2000) (discussing the basis for an evidentiary hearing).

Petitioner has been ordered to file an amended petition regarding his claims. (D.E. 8). In his amended petition, he is challenging a conviction from the 102nd Judicial District Court for

Red River County, Texas. (D.E. 13). An order for service of process has not yet been issued so that respondent has not filed an answer yet. If an evidentiary hearing is determined to be necessary, then one will be set.

Accordingly, it is ORDERED that petitioner's motion for hearing, (D.E. 7); his motion for due process hearing, (D.E. 9); his motion for due process hearing regarding his Fourteenth Amendment right, (D.E. 10); and his motion for due process hearing, (D.E. 12); be DENIED without prejudice.

ORDERED this 3rd day of February 2011.


BRIAN L. OWSLEY
UNITED STATES MAGISTRATE JUDGE